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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment to the Commission's Rules)
Regarding a Plan for Sharing)
the Costs of Microwave Relocation)

WT Docket No. 95-157
RM-8643

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COMMENTS OF
THE PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION

November 30, 1995

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EXECUTIVE SUMMARY

Throughout the PCS proceedings, PCIA has been a leader in assisting the industry in its efforts to clear the 2 GHz band and deploy new PCS systems. With its members, PCIA has brought to the FCC's attention the difficulties, including abuses of the transition rules, that have arisen as the relocation and deployment processes get underway. PCIA has suggested possible solutions in addition to those set forth by the Commission in the Notice and urges the Commission to expeditiously consider these important proposals.

- 1) The FCC should reconsider its use of voluntary negotiation periods since these periods only give incumbents the opportunity to take advantage of PCS providers without giving incumbents any additional protection. Instead, the Commission should give all incumbents a one-year mandatory negotiation period to be initiated by notification by the PCS provider that it would like to begin negotiations.
- 2) PCIA supports the Commission's proposals for clarifying the transition rules with some modifications.
 - Good faith negotiations during the mandatory period should be defined as an offer by a PCS provider and acceptance by an incumbent of comparable facilities.
 - The definition of comparable facilities should be based on technical factors which can be objectively measured, such that, for example, a system comparable to a 2 GHz analog system could be a 6 GHz analog system.
 - Comparable facilities should be limited to the actual costs of relocation and should not include consultant or legal fees not authorized by the PCS provider.
 - Parties unable to conclude negotiations within one year after the start of the voluntary negotiation period (if the Commission maintains voluntary periods) should be required to file two independent cost estimates of a comparable system with the FCC to help resolve differences.
 - PCS providers are only required to relocate links which would suffer interference from their PCS operations.

- The FCC should not allow any additional primary or secondary licensing of microwave operations in the 2 GHz band.
 - PCS providers should be permitted to initiate the voluntary relocation period (if it is maintained) for incumbents outside the A and B blocks by sending a letter that notifies them of the PCS provider's desire to begin relocation negotiations.
 - At the start of the twelve-month test period, an incumbent's authorization should return to the FCC, and at the end of the twelve-month test period, the FCC should make an announcement that the license has been terminated.
 - Incumbents who choose to relocate their own systems in exchange for a cash payment should not be entitled to the twelve-month test period since the PCS provider will have no input into the construction of the relocated link and will be unable to resolve any difficulties. Other incumbents should be permitted to waive the test period by contract.
 - PCS providers should not be required to hold a relocated incumbent's spectrum in reserve but should be required to guarantee the incumbent a comparable replacement system. Holding such spectrum in reserve will delay the deployment of PCS systems for at least a full year.
 - Incumbents should be required to verify their public safety status to PCS providers if they want to take advantage of the extended negotiation periods. In addition, the definition of public safety entities entitled to extended relocation schedules should be limited to those who have substantially all of their communications related to the protection of life and property.
- 3) The FCC should adopt a cost sharing plan consistent with the proposals in the Notice with the few changes outlined herein.
- Only the actual costs of relocation should be eligible for sharing. Premiums above that cost must be absorbed by the relocating entity.
 - The FCC should designate one standard for cost sharing interference determinations based on the ITM and Bulletin 10F.
 - Entrepreneur licensees should be permitted to pay their cost sharing obligations in installment payments similar to their license payment requirements.
 - No new cost sharing obligations should be incurred after April 4, 2005 so that the benefits of cost sharing are not outweighed by the

administrative costs. However, obligations incurred prior to April 4, 2005 would be unaffected.

- Private agreements between PCS providers for the sharing of relocation costs should be permitted as long as the party's cooperate with the clearinghouse in meeting cost sharing obligations with other PCS providers not included in a private agreement.
- 4) PCIA should be designated by the Commission as the clearinghouse to coordinate the cost sharing plan.
- PCIA has vast coordination and PCS experience and is well-suited to take on these responsibilities.
 - PCIA has explored the structure, functions, and funding necessary for the clearinghouse and is prepared to assume this role.

PCIA commends the Commission for its rapid initiation of this proceeding and urges the swift adoption of these proposals so as to expedite the deployment of PCS services to the public.

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**COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA") hereby submits its comments on the Federal Communication Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking regarding microwave relocation.¹ PCIA strongly supports the FCC's goal to move expeditiously to conclude action on the critically important microwave relocation issues affecting the PCS industry that are addressed in this proceeding. As the Commission has recognized, prompt resolution of these issues is necessary to avoid delays in the emergence of this important new technology. PCIA has played a central role in developing the consensus recommendations that have now been proposed by the FCC and urges the Commission to adopt its proposals with the few clarifications and modifications described below and to consider PCIA's additional recommendations to improve the relocation process.

¹ Notice of Proposed Rulemaking, WT Docket No. 95-157 (Oct. 12, 1995)(hereinafter "Notice").

I. ABUSES OF THE COMMISSION'S TRANSITION RULES AND THE ABSENCE OF A COST SHARING MECHANISM ARE DELAYING MICROWAVE RELOCATIONS FROM THE PCS BAND

Since the FCC's establishment of the 2 GHz transition rules for the Personal Communications Services' ("PCS") spectrum, PCIA has worked diligently to facilitate the relocation process for both the PCS and microwave industries in order to expedite the deployment of new PCS services. However, as PCS providers have begun relocating microwave incumbents, several difficulties with the relocation process have emerged. PCIA has endeavored to bring these problems to the FCC's attention and to develop possible solutions.² Consideration of these fundamental issues is essential to reasoned evaluation of particular transition rules and definitions.

A. Abuses of the Transition Rules by Certain Microwave Incumbents and Their Advisors Require Correction

As the A and B Block licensees have moved ahead with relocating microwave links necessary to deploy their PCS systems, PCIA has identified several aspects of the transition rules that require modification so as to more clearly define the parties' responsibilities. Most significantly, some incumbent microwave operators and their advisors are threatening to delay the advent of PCS unless multi-million dollar

² See, e.g., Letter from PCIA to Chairman Reed Hundt, RM-8643 (filed Sept. 22, 1995).

payments are made "as an inducement to consummate this negotiation in a timely manner."³

Notwithstanding the Commission's attempt to establish a fair and equitable transition plan for the relocation of microwave links from the PCS spectrum and the commitments of microwave licensees to conduct themselves reasonably in the relocation process, a number of microwave incumbents and their advisors are seeking to misuse the rules for private gain. As discussed in PCIA's submissions to the Commission, some incumbents in negotiations with PCS licensees are demanding payments that dwarf the actual costs of a comparable, relocated system.⁴ The following are examples of actual relocation demands encountered by PCS licensees during the negotiation process:

³ See Letter from D/I Gregory Curto to Kathryn Drucker (Oct. 13, 1995)(sent via facsimile). Letter is attached as Exhibit A.

⁴ See Letter from Mark Golden of PCIA to Chairman Reed Hundt, RM-8643 (filed Sept. 22, 1995)(containing examples of unreasonable demands by microwave incumbents)(hereinafter "Letter to Chairman"). In addition, PCIA has discussed and sent materials on these issues to the Chairman, the Commissioners, and their staffs on numerous occasions. See, e. g., Letter from Jay Kitchen of PCIA to Chairman Reed Hundt (filed Apr. 4, 1995)(discussing difficulties with the microwave relocation process); Letter from Jay Kitchen of PCIA to Regina Keeney (filed May 25, 1995)(requesting that the Wireless Telecommunications Bureau take several actions to remove procedural uncertainties facing the PCS industry); Letter to Secretary William Caton regarding Ex Parte meeting of Jay Kitchen, Richard Wiley, and R. Michael Senkowski with Commissioner Ness and Mary McManus (filed July 6, 1995); Letter to Secretary William Caton regarding Ex Parte meeting of Jay Kitchen, Richard Wiley, and R. Michael Senkowski with Chairman Reed Hundt, Dan Phythyon, and Ruth Milkman (filed July 10, 1995).

- In exchange for the 2 GHz frequencies, the Suffolk County Police Department requested a total digital microwave upgrade which includes all enhancements. The County also requested additional revenue of \$18 million "as an inducement to consummate this negotiation in a timely manner."⁵
- The PCS licensee surveyed the incumbent's 1.9 GHz system and an equipment manufacturer quoted a relocation price of \$225,000 per link, including an upgrade of equipment. The incumbent demanded \$400,000 in cash for each relocated link, which is in excess of 70% over actual relocation cost. The PCS licensee's negotiator took the incumbent's demand back to the licensee for consideration.

During the interim, the incumbent attended a seminar on the "value" of these frequencies to PCS licensees. The incumbent then rescinded its \$400,000 offer and stated that it would not take less than \$1,200,000 per link. This would put the total demanded by the incumbent to relocate twelve links at \$15,600,000. That is \$12,900,000 more than, or almost five times, the actual cost to relocate the links.

- An incumbent, a municipality, has engaged a law firm to negotiate microwave relocations with PCS licensees on the incumbent's behalf. Without regard to the underlying systems or the actual costs of relocation, the incumbent's negotiators demand \$1,000,000 per link.

The incumbent itself stated that it has a right to get "whatever it can when it sells its assets." When confronted with the fact that its citizens will have to pay more for PCS services (and more for cellular services since PCS will be less competitive) the incumbent also stated, "that's why we like this - it's a hidden tax."

- One PCS licensee noted that although fewer than one-third of the incumbents with whom it must negotiate are causing difficulties, these few account for nearly two-thirds of the links which the PCS licensee must relocate.
- A PCS licensee has been negotiating with an incumbent since April of 1995. The incumbent has the second largest network that is fully contained within the licensee's market. The incumbent initially asked for a Sonet replacement system which is well beyond what could be considered a comparable replacement. Recently, the incumbent has included in its requirements that the

⁵ See Exhibit A.

PCS licensee also relocate the incumbent's 6 GHz analog links. Additionally, the incumbent is one of two incumbents that has not allowed site surveys and due diligence review of its network, thus not allowing the PCS licensee to determine what would constitute a comparable system.

- A PCS licensee is negotiating with a non-public safety incumbent which has the largest network requiring relocation in the PCS licensee's market area. The incumbent has stated that if the PCS licensee wants to relocate the link prior to the end of the voluntary and mandatory negotiation periods, the PCS licensee will have to pay for an aerial fiber replacement system. The incumbent has retained two consultants to assist in the negotiations.
- The incumbent's system is a large multi-link, multi-MTA system in the PCS band with additional links in the 2.1 GHz band. Ten of its "PCS band" links are within the PCS licensee's market, but only one is co-channel to the PCS licensee. The incumbent's position is that the more links a PCS licensee is willing to relocate, the better the per link cost. It is also seeking reimbursement for links in the 2.1 GHz band which are not included in the PCS spectrum. The incumbent has stated that if a PCS licensee wants it to relocate prior to the three-year FCC stated timeframe, a premium would be required.
- The incumbent is a public safety entity and is aware of the leverage that this position affords it. Currently it has a 600 channel analog system which is operating at two-thirds of its capacity. To relocate prior to the expiration of the three-year voluntary and two-year mandatory period, the incumbent is demanding that the PCS licensee provide it with a DS3, 6 GHz replacement system. A sixteen T-1 digital replacement system, which is a considerable upgrade, would be approximately one-half the cost of the requested DS3 system.
- The incumbent, a governmental entity, has four analog links which the PCS licensee needs to relocate. The PCS licensee determined that the cost of providing comparable systems is \$760,000. The incumbent has stated that it would like a cash payment, and it will do the relocation on its own. The PCS licensee offered \$800,000 for the relocation of all four links. The incumbent refused twice to make a counter offer. Later, the incumbent informed the PCS licensee that it would like \$1,000,000 for each relocated link (a total of \$4 million) and payment of its consulting fees of \$250,000.
- The incumbent is a utility company which has twenty-two links, twenty-one of which are analog systems ranging from 132-480 channels. The PCS licensee estimated relocation costs at \$4 million. At the first meeting, the incumbent requested \$22 million to relocate its network. The incumbent based its request

on the book value recovery, replacement value, territorial value, and speed of relocation. In addition, the incumbent added in the cost of relocating several links in the network that the PCS licensee will not need to relocate. The incumbent has also requested that the PCS licensee pay its consultant costs.

- One PCS auction winner has been asked to participate in a venture which plans to buy the relocation rights to microwave links in the 2 GHz band and then resell the rights to PCS providers.

It is these types of demands that are causing PCS providers difficulties as they conduct their negotiations.

In addition, certain consultants and attorneys are charging incumbents significant sums for advice on how to extract premiums well beyond the costs of relocation from PCS licensees. For example, the City of San Diego, an incumbent in the 2 GHz spectrum, signed a contract for \$180,000 for consulting services. As part of their services, the consultants will determine, "[t]he net profitability of each market to the wireless providers," as well as an analysis of each PCS licensee on the basis of capitalization, spectrum auction bid, business experience, and other factors, all of which are largely irrelevant to the issue of providing the incumbent with comparable facilities.⁶ Both law firms and consulting organizations have distributed information packets for incumbents, one of which states that, "[t]he issue of 'comparable facilities' has almost nothing to do with [the voluntary] phase of the negotiations."⁷ In one instance, through materials entitled, "Important Information for All 2 GHz Licensees:

⁶ See Exhibit B.

⁷ Examples of these materials are annexed as Exhibit C.

Big Money and Your 2 GHz Microwave Band Relocation," UTC stated that PCS licensees will lose \$5,000,000 per month of delay in implementing their systems

Should these schemes be successful, the government and the public will fund the unreasonable compensation of microwave incumbents through: (1) lower auction revenues from PCS providers who will reduce their bids in upcoming C, D, E, and F block spectrum auctions in expectation of the excessive relocation costs with which they will be burdened after purchasing the spectrum rights and (2) higher charges for competitive wireless services resulting from the delay in PCS deployment. A study on the cost of these delays has conservatively estimated that abuses of the transition rules by microwave incumbents and their advisors are costing consumers almost \$4 million per day.⁸

As the auction process continues, C, D, E, and F block licensees will face even greater problems than A and B block licensees because their smaller license areas (BTAs rather than MTAs) and block size (10 MHz for D, E, and F licenses) will make it more difficult to "engineer around" a microwave licensee who refuses reasonable offers for relocation. Entrepreneur licensees will be faced with the choice of paying huge, unexpected relocation costs or delaying offering service which could result in a financial crisis. Unable to "turn-on" their systems because of microwave incumbents, such licensees will be forced to pay whatever an incumbent asks.

⁸ Letter to Chairman at Attachment F (Estimate of Losses to Government and Consumers Resulting from Microwave Relocation Rules by Professor Paul Milgrom, Stanford University).

As a result of these problems, PCIA has recommended and the FCC has proposed a number of clarifications to those rules which are critical to helping alleviate many of these abuses while still protecting microwave incumbents' legitimate interests. PCIA strongly supports the Commission's tentative conclusions and believes that adoption of the proposed clarifications is crucial to ensuring that the rules succeed in their intended purpose: ensuring prompt deployment of PCS while protecting microwave incumbents' rights to full cost compensation and a comparable system in alternative spectrum. However, unless the FCC reconsiders its use of voluntary transition periods, the abuses of the rules may continue and result in serious damage to the PCS industry and its ability to compete with other wireless services.

B. It Is Essential that the FCC Adopt a Microwave Relocation Cost Sharing Plan to Expedite Relocation of Microwave Links From the PCS Spectrum

After the transition rules were established, PCIA realized that an important factor in advancing the clearing of the PCS spectrum remained unaddressed. In Docket No. 90-314, PCIA recommended the adoption of a mechanism to promote sharing of the costs of microwave relocation among benefitted PCS providers.⁹ That proposal was the result of extensive industry discussions initiated by PCIA to develop a

⁹ Amendment of the Commission's Rules to Establish New Personal Communications Services, PCIA Petition for Partial Reconsideration, GEN Docket 90-314 (filed July 25, 1994); Amendment of the Commission's Rules to Establish New Personal Communications Services, PCIA Comments on Petition, GEN Docket 90-314 (filed Aug. 30, 1994); Amendment of the Commission's Rules to Establish New Personal Communications Services, Reply Comments, GEN Docket 90-314 (filed Sept. 9, 1994).

consensus approach to dealing with cost sharing issues. The Pacific Bell petition that initiated this proceeding was based on the industry-wide conclusions that emerged from those efforts.¹⁰

PCIA has continued to work with the PCS industry to develop a consensus approach to cost sharing and has succeeded in designing a plan that the majority of PCS licensees have endorsed. This approach to promoting an equitable distribution of relocation costs -- which was filed with the Commission by PCIA in response to the Pacific Bell petition -- is the basis for the Commission's tentative conclusions in the Notice.¹¹ PCIA firmly believes that the immediate adoption of its cost sharing plan will provide the incentives necessary to prevent PCS providers from delaying their relocation efforts and the deployment of PCS.

As PCIA has consistently advocated, a cost sharing mechanism based on the principles put forth by PCIA will benefit all facets of the PCS industry as well as the microwave incumbents. First, cost sharing will encourage the efficient relocation of microwave users, allowing for PCS service to be delivered to the public on an expedited basis. Second, PCS providers will be able to deploy their services sooner, thus saving on administrative costs and expediting recoupment of their investments. In addition, the relocation process will be greatly simplified for microwave licensees by

¹⁰ Petition for Rulemaking of Pacific Bell Mobile Services, RM-8643 (filed May 5, 1995).

¹¹ Comments of PCIA, RM-8643 (filed June 15, 1995).

reducing the number of PCS providers with whom they must negotiate, and system-wide relocations will be facilitated.

To protect the interests of entrepreneur licensees, these entities will be able to take advantage of the PCS providers' early relocation efforts, but will be able to pay their shares of the costs in installment payments, the total of which will be capped. Future C, D, E, and F licensees in particular will benefit because they will experience a greater number of situations in their smaller BTA markets in which multiple PCS providers have an interest in sharing the costs of relocating a microwave link. From the FCC's perspective, its administrative role will be minimized by privatizing the cost sharing process and considering complaints regarding cost sharing only as part of any PCS licensing process, such as license renewal, assignment, or transfer.¹² The FCC's proposed cost sharing mechanism incorporates the basic principles of the PCIA plan and will therefore realize the benefits PCIA anticipated.

PCIA urges the FCC to promptly adopt the proposals in the Notice. The proposed modifications to the transition rules together with the cost sharing plan will provide the basis for expeditious relocation of microwave incumbents, while preventing excessive relocation demands from raising the price of PCS services (and cellular services that escape competitive pressures during the delay in PCS system deployment) as well as depressing future auction revenues.

¹² If the FCC finds during consideration of a cost sharing dispute that a PCS provider is entitled to cost sharing reimbursement, that PCS provider should receive the funds it is entitled to plus interest from the time the obligation was incurred.

II. THE FCC SHOULD ELIMINATE THE VOLUNTARY NEGOTIATION PERIODS AND HAVE ONLY A ONE-YEAR MANDATORY NEGOTIATION PERIOD

When the FCC initially established its voluntary and mandatory transition periods, it stated:

We believe that these voluntary and mandatory negotiation periods provide a reasonable balance between the need to ensure orderly relocation of fixed microwave facilities where necessary to permit provision of emerging technology services and the national interest in facilitating development of new technologies and services. An initial two year period will prevent disruption of the existing 2 GHz services. The one year mandatory negotiation period ensures that an incumbent licensee will not be faced with a sudden or unexpected demand for involuntary relocation if an emerging technology provider initiates its relocation request after the two-year initial period. These periods provide adequate time for fixed microwave licensees to prepare for relocation and encourage good faith and fair voluntary negotiations.¹³

However, the FCC's rules are now quite thorough and provide substantial protections to microwave incumbents so that in no case could an incumbent be faced with a "sudden or unexpected" demand for relocation. In order to relocate an incumbent, the relocating PCS provider must:

- Guarantee payment of all costs of relocating to a comparable facility, including all engineering, equipment, and site costs and FCC fees, as well as any reasonable additional costs;
- Complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination; and
- Build and test the new microwave (or alternative) system.

¹³ Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589, 6595 (1993).

In addition, the FCC has enacted other protections for microwave licensees, including:

- A microwave licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and to ensure a seamless transition to the new facilities.
- If, within a period of one year after relocation, the relocated microwave licensee demonstrates that the new facilities are not comparable to the original facilities, the PCS licensee or device manufacturer must remedy the defects or pay to relocate the microwave licensee back to its former (or other equivalent) 2 GHz band frequencies.

This panoply of protections, particularly a seamless transition to the new facilities, guarantees that an incumbent can never be required to relocate "suddenly" but would have to be given a new system and be allowed to test it prior to any transition.

Some incumbents have voiced fears that they could be forced to relocate even though there would not be spectrum available. However, the FCC's transition rules clearly state that an incumbent cannot be relocated until new spectrum or an alternative medium is available. After the FCC reallocated the 2 GHz spectrum to emerging technologies, it "stated its intention to make available fixed microwave bands above 3 GHz to reaccommodate incumbent 2 GHz fixed microwave licensees in geographic areas where sharing would not be possible due to potential interference between the services."¹⁴ To ensure that there would be adequate spectrum to accommodate incumbents relocated from the PCS spectrum, the FCC allocated additional spectrum at 4, 6, and 11 GHz for these operations.¹⁵

¹⁴ Second Report and Order, 8 FCC Rcd 6495, 6496 (1993).

¹⁵ Id.

When the FCC solicited comments on the negotiation periods, all of the PCS providers who commented suggested shorter negotiation periods so as not to allow incumbents to demand premiums over actual relocation costs and delay the deployment of PCS. For example, PCIA (then Telocator) stated:

Under these conditions [the requirement for full compensation and the provision that no licensee need ever move if the relocation would cause technical or economic harm], a transition period serves no evident purpose other than to provide incumbents a more extended period during which they are in a position to negotiate for their "early" relocation at a premium cost.¹⁶

In response, several microwave incumbent interests denied that they would attempt to take advantage of the generous rules the FCC was providing. For example, Questar Service Corporation stated:

Questar is disturbed, for example, that several parties' comments reflect the belief that 2 GHz microwave licensees will be unreasonable and use this opportunity to make exorbitant demands on new technology service providers. Companies such as Questar have an overriding responsibility to ensure the safety and efficiency of their operations. This objective must be paramount in any evaluation of comparable alternate facilities. If the Commission adopts a reasonable voluntary negotiation period, the parties should be able to negotiate comparable alternative facilities acceptable to both.¹⁷

UTC, the telecommunications association for public utilities, was similarly outraged.

The concerns expressed by LOCATE [PCNS-NY] and others are groundless and are based on a fundamental misunderstanding of the use to which private microwave users put their facilities. As UTC and numerous other commenters emphasize, private microwave facilities are a business "tool," and not a commercial "franchise." UTC understands that the proponents of

¹⁶ Comments of Telocator, ET Docket No. 92-9, at 7 (filed Jan. 13, 1993).

¹⁷ Comments of Questar Service Corporation, ET Docket No. 92-9, at 5-6 (filed Feb. 12, 1993)(footnote omitted).

commercial PCS systems value spectrum for its profit-making potential, and are inclined to attribute the same motives to private microwave licensees. However, the evidence submitted in this proceeding confirms that microwave licensees will, in good faith, negotiate for reasonable offers to relocate to alternative facilities.¹⁸

As described above, many microwave incumbents are doing exactly what UTC and Questar said they would not do -- abusing the regulatory process by using their microwave licenses as a source of profit. PCS providers are being faced with exorbitant demands for four and five times the actual costs of relocation, by both public safety and non-public safety licensees. The voluntary relocation period, rather than protecting incumbents, is giving those inclined to take advantage of the FCC's rules the opportunity for to seek financial windfalls.

PCIA believes that the FCC should eliminate the voluntary relocation period for both public safety and non-public safety licensees and have only a one-year mandatory relocation period for all incumbents in the PCS spectrum. Since the FCC's rules fully protect *all* incumbents from any disruption to their communications from relocation, a one-year negotiation period is ample time for the parties to complete their agreement. The mandatory negotiation period would begin when a PCS provider notifies an incumbent of its desire to begin negotiations. Since the PCS provider would start the one-year period by beginning negotiations, all incumbents, including those in rural areas who may not be relocated for several years, would be guaranteed a full year to come to an agreement with the relocating PCS provider. PCS providers and

¹⁸ Comments of UTC, ET Docket No. 92-9, at 17 (filed Feb. 12, 1993).

microwave incumbents should be required to negotiate in good faith as soon as negotiations begin -- there is no reason to give incumbents the opportunity to not negotiate in good faith since this will only invite them to ask for premiums over actual relocation costs and delay the ultimate deployment of PCS.

The modifications to the transition rules that the FCC has proposed are a good beginning to expediting the relocation process. However, as long as incumbents are allowed a voluntary negotiation period, unscrupulous persons will continue to abuse the process and delay service to the public.

III. IN ITS FILINGS WITH THE COMMISSION, PCIA HAS IDENTIFIED A NUMBER OF SPECIFIC REFINEMENTS TO THE PCS TRANSITION RULES REQUIRING EXPEDITIOUS ACTION BY THE COMMISSION TO PREVENT DELAYS IN THE DEPLOYMENT OF PCS SERVICES

In its proposals, the FCC has made significant improvements to the relocation process. The Commission proposes to define good faith negotiations as negotiations based on determining comparable facilities. Second, comparable facilities are more clearly defined and based on technical factors. Next, although the FCC has proposed to limit only primary licensing of microwave operations in the PCS band, PCIA believes that both primary and secondary licensing should be limited. To further expedite the clearing of the band, the FCC should permit PCS licensees to initiate the transition period for microwave licensees in the C, D, E, and F blocks. PCIA also believes that several clarifications to the twelve-month test period are necessary to ensure that the deployment of PCS systems is not delayed. Finally, PCIA supports the

FCC proposal that public safety entities be required to verify their status and would limit the definition of entities eligible for the public safety extended transition periods.

A. Good Faith Negotiations Should Be Defined as the Offer and Acceptance of Comparable Facilities

In its efforts to devise solutions to these problems, PCIA submits that the compensation rules should include disincentives for abuse while still protecting incumbents' rights to comparable systems. PCIA recommended that the rules governing compensation for relocation costs be modified to inhibit bad faith bargaining for unwarranted windfall payments. The FCC's tentative conclusion that an offer by a PCS licensee to replace a microwave incumbent's system with comparable facilities constitutes a "good faith" offer will help focus relocation negotiations on the ultimate objective: supplying the incumbent with a comparable system.¹⁹ Thus, an incumbent that accepts an offer of comparable facilities should be considered to be acting in good faith, and failure to accept an offer of comparable facilities should create a rebuttable presumption that the incumbent is not acting in good faith.

PCIA also agrees with the Commission that there should be a self-executing mechanism to ensure that incumbents bargain in good faith.²⁰ PCIA suggests that if a microwave incumbent is found not to be acting in good faith, the relocating PCS provider should only be required to tender a cash payment to the incumbent in an

¹⁹ Notice, ¶ 69.

²⁰ Id., ¶ 69.

amount not to exceed the greater of the independent appraisals, and the incumbent's system should be converted to secondary status in ninety days. Such a "penalty" for bad faith will ensure that parties come to the negotiating table prepared to come to a fair agreement.

B. To Facilitate the Negotiation Process, "Comparable Facilities" Must Be More Clearly Defined

Since the adoption of the comparability standard, PCIA has been concerned that additional clarification of that standard is necessary so that both PCS relocators and microwave incumbents understand the basis for their negotiations.

1. The Determination of Comparability Should Be Based on Technical Factors

When the FCC first requested comment on this issue, PCIA (then Telocator) recommended that the FCC declare a rebuttable presumption of comparability if the PCS provider showed that its proposed relocated facility's technical specifications met or exceeded those of the incumbent's existing facilities.²¹ PCIA continues to believe that basing a comparability standard on objective technical factors is the best method of ensuring that a relocated system is "comparable" while minimizing potential disputes between the parties.

Consequently, PCIA supports the FCC's proposal that comparable facilities be evaluated with respect to three major factors: communications throughput, system

²¹ Comments of PCIA, ET Docket No. 92-9, at 11-12 (filed Jan. 13, 1993).

reliability, and operating cost.²² PCIA submits that if a replacement facility's communications throughput and reliability are equal to or greater than that of the system to be replaced, and the operating costs of the replacement system are equal to or less than those of the existing system, the new system should be considered comparable. Allowing parties to "trade-off" system parameters in order to provide comparable facilities is consistent with this technical approach.²³ This approach will ensure that incumbents are provided with a comparable system which meets the same needs as their current system while preserving the finite resource of the microwave spectrum.

Although PCIA supports the Commission's choice of comparison factors, the agency also must clarify its measurement of the throughput of an analog system.²⁴ Throughput for an analog system should be measured by the number of 4 kHz voice channels or the equivalent rather than the number of voice and/or data channels.²⁵ Measuring throughput on 4 kHz channels is more consistent with the FCC's rules.

To further define the comparability standard, PCIA concurs in the Commission's proposal to consider facilities comparable in cases where the specific increased costs associated with the replacement facilities are paid by the party

²² Notice, ¶¶ 72-73.

²³ Id., ¶ 75.

²⁴ Id., ¶ 74.

²⁵ See, 47 C.F.R. § 21.710.